

(A Bit More) On Judicial Speech and the First Amendment

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I. INTRODUCTION

In her recent article, *When Should the First Amendment Protect Judges from Their Unethical Speech?*,¹ Professor Lynne Rambo offers a thoughtful examination of an important and largely overlooked topic in the ethical and constitutional literature—the First Amendment rights of sitting judges. Professor Rambo’s analysis focuses on existing codes of judicial ethics and how they may impede judges’ First Amendment rights by subjecting them to various forms of discipline based on their speech. She concludes that a version of the Supreme Court’s test in *Pickering v. Board of Education*² should apply to judges whose speech raises ethical concerns. *Pickering* dealt with the First Amendment rights of public employees. Under the *Pickering* test, whether a public employee’s speech is constitutionally protected depends on a balancing of the employee’s personal interest in their speech against the government’s interest in “promoting the efficiency of the public services it performs through its employees.”³

Professor Rambo’s article raises several interesting issues worthy of further exploration. In this short Essay, I highlight three such lines of inquiry that may supplement her analysis. More specifically, I contend that there are additional considerations and distinctions within the context of judicial speech that may shed new light on the relationship between that speech and the First Amendment.

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¹ Lynne H. Rambo, *When Should the First Amendment Protect Judges from Their Unethical Speech?*, 78 OHIO ST. L.J. 279 (2018).

² *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

³ *Id.* at 568.

II. THE NATURE OF THE DISCIPLINE

The free speech implications of ethics codes or statutes may vary depending on the forms of discipline available under those provisions. There are at least three categories of disciplinary action that can befall judges—censure (public or private), suspension, and recusal.⁴ Professor Rambo’s article focuses on judicial ethics codes, which may include all three forms of discipline, but does not consider the differential effects of these varied punishment regimes on judges’ First Amendment rights.⁵ In reality, each form of discipline could impact differently the application of *Pickering*. While a judge’s interest in “commenting upon matters of public concern” in a way that is not “ordinarily within the scope of [the judge’s official] duties” will likely not change based on the penalty accompanying that speech, the weight of the government’s interest “in promoting the efficiency of the public services it performs through its employees” might.⁶

Imagine a rationale for restricting judicial speech that depends on protecting judicial integrity and promoting public confidence in the judiciary.⁷ Private censure of a judge will contribute little to that end; if the public is not privy to the censure, it has no reason to believe that the offending judge has been held accountable for her actions. At the other end of the spectrum, measures like public censure and suspension could be powerful vehicles for inspiring public confidence, depending on the nature of the speech and the severity of the consequences. Publicly admonishing judges for their unethical or detrimental

⁴ At the federal level, different statutes address censure and suspension, as opposed to recusal. *Compare* 28 U.S.C. §§ 351(a), 354(a)(2)(A)(i)–(iii) (2012) (explaining that in response to a complaint “that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts,” the judicial council of that circuit may order that, “for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint” or censure that judge “by means of private communication” or “by means of public announcement”), *with* 28 U.S.C. § 455(a) (mandating recusal for “[a]ny justice, judge, or magistrate judge of the United States . . . in any proceeding in which his impartiality might reasonably be questioned”).

⁵ Of course the ultimate disciplinary action would be removal from office, which is prohibited except by impeachment in the federal and many state systems. *See, e.g.*, 28 U.S.C. § 354(a)(3) (“Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior.”). Even in cases where it would be theoretically available in response to a judge’s speech, the prospect of removal would only advance the larger point of this Part that the choice of disciplinary action can alter the First Amendment calculation under *Pickering*. It is not hard to imagine how a given government interest would be advanced differently by a private censure letter than by removal of a judge from the bench.

⁶ *Lane v. Franks*, 134 S. Ct. 2369, 2377, 2379 (2014) (quoting *Pickering*, 391 U.S. at 568).

⁷ This was the rationale for the judicial campaign restrictions at issue in *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015) (“The Florida Supreme Court adopted Canon 7C(1) to promote the State’s interests in ‘protecting the integrity of the judiciary’ and ‘maintaining the public’s confidence in an impartial judiciary.’”).

speech reflects a commitment to judicial integrity and provides a deterrent from future misdeeds.

Recusal, which operates on a case-by-case basis, fits somewhere in between. It can bolster public confidence in the judiciary where a judge's speech was specifically relevant to a case before her, but can become too burdensome when it is used as a remedy for more general comments. Unlike suspension, which is levied for a particular time frame but is generally not content-specific, recusal is substantive. It requires a judge to remove herself from any case that includes subject matter related to the controversial speech at issue. As a result, using recusal as a remedy for problematic speech could, as Chief Justice Roberts explained, "disable many jurisdictions" by excluding judges indefinitely from an entire category of cases or "'erode public confidence in judicial impartiality' and thereby exacerbate the very appearance of the problem the State is trying to solve" by incentivizing recusal motions from parties seeking to exclude unsympathetic judges from future litigation.⁸

If the government's rationale for its speech restrictions changes slightly, for instance to avoiding the public appearance of partiality in a case or category of cases, the relationship between the government's interest under *Pickering* and the available forms of discipline also changes. Private censure would again seem the weakest, as measures taken outside of public view are unlikely to cure problems with public perception of a judge's partiality. Compared to promoting judicial integrity, public censure is arguably less useful in promoting a perception of impartiality in a given case or cases, as it does nothing to shield litigants from the allegedly biased judge—the public could still be concerned about a judge's impartiality despite a public admonishment of the judge and her conduct. That is not to say public censure would do nothing to promote the perception of judicial impartiality, only that it could have less of a positive effect in a specific case or group of cases than in a more general context. Suspension does provide protection for litigants in specific cases, but is time limited and generally applicable. This makes it an awkward fit with problems of perceived judicial bias, which are usually triggered by speech or actions relating to a particular group or subject matter. Recusal, by contrast, is a much better fit for such a concern, and perhaps for that reason is often specifically targeted at problems of perceived bias.

Another government rationale that could alter the First Amendment analysis of judicial speech is a desire to protect the litigants in a specific case or group of cases from a biased judge. Neither form of censure is a particularly good fit with this narrower governmental purpose. Admonishing a judge, whether publicly or privately, does little to protect litigants from that judge's prejudices. Suspension is a much better fit, provided the suspension covers the entire range of cases that could be subject to that judge's bias. But the fact that suspension is time limited and general makes it potentially both over and underinclusive as a

⁸ *Id.* at 1671–72 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 891 (2009) (Roberts, C.J., dissenting)).

weapon against specific claims of judicial prejudice. Recusal is the best option. It allows for the exclusion of a judge from any and all cases “in which his impartiality might reasonably be questioned,”⁹ thereby protecting litigants from potentially biased judges without unduly punishing that judge for speech that does not implicate the government’s specific interest under *Pickering*.

It is worth noting that none of these arguments are meant to be exhaustive or dispositive. It may well be that the *Pickering* test is the best choice for evaluating extrajudicial speech under the First Amendment. What the foregoing demonstrates, however, is that the particular consequences attending judicial speech could at minimum shift the *Pickering* analysis enough to merit further consideration.

III. THE TYPE OF COURT

Another potentially significant factor pertaining to the First Amendment and judicial speech is the speaking judge’s employment status. *Pickering* addressed the constitutional implications of speech by government employees, and refers to the government’s interest in the service provided by those employees. For most judges, the idea of being an employee is incongruous with their role on the bench. This is certainly true of life-tenured judges and justices, and may be just as compelling for every judge in a position that was designed to be politically independent. At the federal level, tenure and salary protections are the keys to independence, and that independence is meant to insulate the judiciary from the dynamics of politics and popular opinion. Their job security makes federal judges free from supervision in a way that is markedly different from a traditional employee. It is therefore worth inquiring if the Court’s reasoning in *Pickering* holds in the context of judges who, unlike most government employees, are expected to operate free from direct supervision.

A distinction more directly targeted at the speech question is the difference between elected and appointed judges. Elected judges hold positions that are designed to make them politically accountable. The extrajudicial speech of elected judges is therefore, at least to some degree, relevant to their job security and performance. That could change the balance under *Pickering* by giving elected judges an even greater interest in their extrajudicial expression than appointed judges. One could also look at the issue of elected judges in precisely the opposite way. Because they are meant to be publicly accountable, it may be that elected judges do not engage in *any* extrajudicial speech; the act of expressing themselves (publicly, at least) is judicial precisely because it is meant to impact their professional status. Either way, the speech acts of elected judges are distinct from their appointed counterparts.

Appointed judges are almost always less publicly accountable for their actions—professional and otherwise—than those who are elected. This is certainly true for those that are appointed for life, or whose reappointment is by

⁹ 28 U.S.C. § 455(a).

rule presumptive. It is similarly true for judges that are subject to periodic reappointment by other government actors. While the speech of judges desiring reappointment is more consequential to them and their careers than it would be to life-tenured judges, the relevant audience for judges subject to reappointment is likely smaller and more politically predictable than for a judge seeking re-election. Appointed judges are also far less likely than elected judges to face challenges from other candidates. This puts elected judges in the unfavorable position of having to speak more often about topics that they would otherwise choose to avoid. In short, whether a judge is elected or appointed, and for how long, could alter the judge's personal interest in her speech and, in turn, the scope of her First Amendment protection under *Pickering*.

Another factor in the interaction of judicial speech and the First Amendment is whether a judge sits on a court of last resort (referred to generally here as a "justice" sitting on a "supreme court").¹⁰ Unlike the above factors, this is not because the level of court will necessarily affect *Pickering* balancing. Rather, it is because holding supreme court justices accountable for their speech could have negative implications for the separation of powers. The federal government, along with every state in the Union, has a tripartite system of government with an independent judiciary. The overwhelming majority of those judicial systems have set numbers of justices and do not allow for replacement justices when a justice is disqualified or unavailable. As a result, any speech-related discipline that prevents a justice from participating in a case—suspension or recusal, for instance—could negatively impact the court's ability to function. This is especially true if more than one justice faced disciplinary action at the same time or in the same case. In that situation, the court's membership could fall below a quorum for a particular case (or even to zero depending on the timing and number of justices), and the court would thus be unable to perform its constitutional duties. This phenomenon, which I have referred to elsewhere as "complete recusal,"¹¹ may be more prevalent in the context of removal based on personal relationships, but is certainly plausible in the speech context. Judges are increasingly interacting with the media, including social media. If several members of one court made comments that, for example, made them eligible for disqualification under the applicable recusal statute, then the consequences of that speech act could be to interfere with their court's ability to perform its judicial duty.

But even without complete or mass removal of irreplaceable justices, removing a single justice from a case has consequences that are profoundly different from disciplinary actions against replaceable lower court judges. Removing an irreplaceable justice at minimum leaves an otherwise odd-member court with an even number of deciders, thereby inviting tie votes and other

¹⁰ The moniker "supreme court" is of course not exclusively reserved to courts of last resort—New York's state trial court is called the "supreme court."

¹¹ See LOUIS J. VIRELLI III, DISQUALIFYING THE HIGH COURT: SUPREME COURT RECUSAL AND THE CONSTITUTION 78–79 (2016).

abnormalities that would not occur when disciplining a replaceable lower court judge for the same conduct. It may be that the benefits of judicial discipline justify the costs of changing the size and makeup of a supreme court in a given case or for a given period of time. Regardless of any normative arguments for or against disciplining justices for their speech, the fact remains that whether a judge is a supreme court justice or a lower court judge could—and I contend should—impact the analysis.

IV. THE EFFECT ON LITIGANTS

A final factor is another constitutional issue: the compatibility of judges' First Amendment rights with the due process rights of individual litigants. Litigants are constitutionally entitled to due process, the core of which is a hearing before an impartial arbiter. In the judicial ethics context, due process depends on whether the litigants experience a "probability of actual bias" by the judge.¹² Because both due process and free speech are constitutional protections, a judge's First Amendment rights must be weighed against the impact of judicial speech on the due process rights of the litigants before her. At first blush it would appear that the two concepts should not overlap. After all, how could speech so harmful as to create a probability of actual bias be protected under the First Amendment, in particular under the *Pickering* balancing test, which expressly considers the government's interest in the efficient performance of its public function? The short answer will often be that it won't—speech creating a probability of judicial bias will trigger a correspondingly high government interest in promoting the efficiency of the judicial branch, and thus will likely fail to receive protection under *Pickering*. But that outcome is not necessarily predetermined in every case. In cases where a judge's extrajudicial speech is of the highest personal importance, for example an impassioned endorsement of a personal religious or political belief, it is at least plausible that the government's interest in efficient adjudication could not overcome it. The result would be that the First Amendment would protect the judge from discipline—recusal, suspension, etc.—for that speech, even though it creates a due process problem for the litigant. More importantly for present purposes, even if such cases are rare, the question itself is critical to the endorsement of a First Amendment standard for judicial speech.

V. CONCLUSION

The interaction of extrajudicial speech and the First Amendment is of increasing importance as judges become ever more active public figures. Professor Rambo's article does an admirable job of highlighting this interaction. This short Essay seeks to build on her work by offering additional factors—such as the nature of the discipline, the type of court, and the consequences to

¹² *Caperton*, 556 U.S. at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

litigants—that may serve as the basis for further exploration of the constitutional boundaries of judicial speech.